". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . ."

Section 1(20) of the Act (49 U. S. C. § 1(20), 24 Stat. 379, as amended 40 Stat. 101 and 41 Stat. 478) provides:

"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the . . . abandonment covered thereby. Any . . . abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 1(22) of the Act (49 U. S. C. § 1(22), 24 Stat. 379, as amended 40 Stat. 101 and 41 Stat. 478) provides:

> "The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Labor Law of the State of New York, § 196 (N. Y. Sess. Laws 1956, ch. 742) provides:

> "1. Every corporation or joint-stock association operating a steam, electric or diesel surface railroad . . . shall, on or before Thursday of each week pay to each person employed by it, except those employed in an executive capacity, the wages earned during the seven day period ending on Tuesday of the preceding week."

The Penal Law of the State of New York, § 1272 (N. Y. Sess. Laws 1941, ch. 809) provides:

> "Each person, copartnership, corporation or joint-stock association, carrying on a business by lease or otherwise, who does not pay the wages of all his or its employees, in accordance with the provisions of the labor law is, and the officers of any such corporation who knowingly permit the corporation to violate the labor law by failing to pay the wages of any of its employees in accordance with the provisions thereof are, guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars or imprisoned for not more than one year, or

punished by both such fine and imprisonment, for each such offense. . . ."

Statement of the Case

The Jay Street Connecting Railroad (herein called the "railroad") transported freight in carload lots by water upon carfloats propelled by tugboat between the railroad's Brooklyn tracks and interchange points with trunk line railroads located in Hudson County, New Jersey, and in Bronx County, New York (*infra*, p. 33). Its tracks extended for a few city blocks in a small area of Brooklyn, New York, lying along the East River under and on either side of the ramp of the Manhattan Bridge. The railroad had no passenger traffic.

In June, 1958, the railroad applied to the Interstate Commerce Commission (herein called the "ICC") for a certificate of public convenience and necessity permitting abandonment of its entire line (10a-11a). The railroad was insolvent in an amount in excess of $400,000 (56a-57a). Its liquid assets amounted to only $407.83 cash in bank (75a, 24a). Its only tugboat was disabled because of an accident and required repair at a cost between $45,000 and $50,000 (60a-62a).

The railroad's revenues were derived from divisions of through rates with trunk line carriers. On August 5, 1958 the trunk line carriers discontinued the credit which they had theretofore extended to the railroad by permitting it to withhold and apply toward its operations the trunk lines' share of rate divisions for shipments originating on its line (48a, 62a; *cf. Meyers* v. *Jay Street Connecting R. R.*, 259 F.2d 532, 534 (2d Cir. 1958), Appendix B, *infra*, p. 34). As a consequence of this action of the trunk line carriers, the railroad on August 6, 1958 announced that, due to lack

of corporate funds to meet payroll and other operating expenses, it was forced to "issue an embargo on all freight" effective August 8, 1958 (15a).*

Respondents (an owner of buildings who alleged that his rent collections were dependent on continued railroad service, and manufacturing or business corporations which were served by the railroad) commenced this action on August 7, 1958 in the United State District Court for the Eastern District of New York for a mandatory injunction restraining petitioners from abandoning the interstate operation of the railroad or from in any manner ceasing operations or refusing to receive, transport or deliver freight until the ICC should issue an order permitting abandonment (8a-14a).

Respondents having given security in the amount of $10,000 for costs and damages, the Court issued a temporary restraining order which was in effect between August 8, 1958 and August 20, 1958 as follows (21a):

> "Ordered, *that defendants, and each of them,* their agents, servants, employees and attorneys, and all persons in active concert and participation with them, *be, and they hereby are, restrained from* in any manner, to any extent, either directly or indirectly *abandoning or ceasing operations of the defendant Jay Street Connecting Railroad or in any manner from refusing to receive, deliver or transport freight via its line. . . .*" (Emphasis added.)

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*The term "embargo" in relation to railroad operations has been defined as follows:

> "An embargo is an emergency measure placed because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier. . . ." *Frochling Supply Co. v. Atchison, T. & S. F. Ry.*, 274 I. C. C. 513, 518 (1949), *order dismissing action to review aff'd, Frochling Supply Co. v. United States*, 194 F.2d 637, 641 (7th Cir. 1952).

On August 20, 1958, the Court issued a preliminary injunction which was conditioned upon a $50,000 bond and which included provision as follows (25a):

> "Ordered, that defendants, Jay Street Connecting Railroad, and Moses Spatt, Milton E. Spatt, Joseph S. Wohl, and Herbert S. Struller, in their capacity as officers or directors or employees of said defendant, Jay Street Connecting Railroad, and their agents, servants, employees and all persons in active concert and participation with them *be and they hereby are restrained and enjoined,* until October 8, 1958 and thereafter as the Court or the trial judge may direct, *from directly or indirectly abandoning or ceasing operations of the defendant, Jay Street Connecting Railroad, or refusing to receive, deliver or transport carload freight for shipment via its line . . . and said defendants are hereby ordered and directed . . . to continue operations of defendant, Jay Street Connecting Railroad,* or if operations have been discontinued in any manner, to resume operations thereof. . . ." (Emphasis added.)

This preliminary injunction was affirmed by the Court of Appeals (Appendix B, *infra*).

On December 1, 1958 the District Court, in an opinion printed in Appendix C, *infra,* modified the injunction to except spur, team, and side tracks from its operation. The Court of Appeals, in an opinion printed in Appendix D, *infra,* reversed this order, holding that such tracks constituted the sole terminal facilities of the railroad, and that the exemption provided by Section 1(22) of the Interstate Commerce Act for such tracks located within a single state was inapplicable.

Trial of the action was had on various days from February 5 to February 20, 1959. The District Court's opinion was handed down on April 14, 1959; and on May 26, 1959

final judgment was entered granting a permanent injunction as follows (32a):

> "Ordered, adjudged and decreed, that the injunction heretofore granted herein be, and it hereby is, made permanent until a certificate of public convenience and necessity issued by the Interstate Commerce Commission permitting abandonment of defendant Jay Street Connecting Railroad becomes effective."

In the meantime, the ICC by order dated April 13, 1959 (the day before the opinion after trial herein), amended May 26, 1959 (the date of the final judgment appealed from herein), granted permission to abandon the entire line of railroad, effective 30 days from the service of said order of May 26, 1959. The report of the ICC containing its findings and conclusions appears in *Jay Street Connecting R. R. Abandonment*, 307 I. C. C. 137 (1959). The order of the ICC was affirmed by a statutory three-judge court, over objection of certain of those who are here respondents, on June 26, 1959 (*Jay Street Connecting R. R.* v. *United States*, 174 F. Supp. 609 (E. D. N. Y.)). No appeal was taken.

Pursuant to the order of the ICC, thus affirmed, the railroad was abandoned on or about June 27, 1959.

The announcement that operations would be embargoed prior to the determination by the ICC of the railroad's application for a certificate of convenience and necessity authorizing abandonment occurred solely because it was an impossibility for the railroad to continue its operations. This railroad was not merely insolvent; it had neither assets nor revenues from which the barest minimum costs of continuing service could be met. The Court of Appeals noted (*infra*, pp. 33-34) that the District Court had found that the railroad had lost money for five years, was still losing

money in increasing amounts, that its current liquid assets approximated $400, and that it had continued operations only by withholding from the trunk lines their share of freight revenues and by advances from its stockholders.*

Uncontradicted evidence at the trial established that the railroad's accrued operating revenues (a large part of which were not collectible) amounted to only $15,500. per month, and that the payroll alone was $22,900. per month, exclusive of other expenditures for fuel, maintenance of equipment, maintenance of ways, or rent of a tugboat and equipment indispensable to the operation, and exclusive of any provision for compensation of executive officers (who at all times served without salary) or for rent of real property (50a; 60a-62a; 88a-93a; 99a-102a). The railroad's realizable assets had been expended; it had no assets other than property required in the operation (90a-93a; Exhibit D**).

Continued operations would give rise to wage claims which the railroad could not pay; and failure by a railroad to pay such claims is declared a penal offense under the laws of the State of New York for which both the railroad and its officers are punishable (N. Y. LABOR LAW § 190 and N. Y. PENAL LAW § 1272, printed *supra*).

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*Comparable findings of net losses extending back to 1937 were made by the ICC (*Jay Street Connecting R. R. Abandonment*, 307 I. C. C. 137 at 145, 163 (1959)).

**This exhibit, filed herein with the certified transcript of the record, consists of certified financial statements of the railroad at December 31, 1958. These statements reflect total cash funds of $465.78, total assets of $80,601.24 and liabilities of $842,481.65. They reflect for the year 1958 a net loss of $364,337.95 incurred in a business which had operating income of only $520,846.70. They also reflect that the railroad, which at July 31, 1958 was indebted to the individual petitioners Moses Spatt and Joseph S. Wohl in the amount of $298,141.51, received $89,901.74 in further advances from those petitioners from August 1, 1958 to December 31, 1958. Such advances continued and increased in and after January 1959 and were the means by which the operations of the railroad were conducted (60a-64a, 89a, 90a, 94a).

Because the railroad lacked the physical means to comply with the command of the court to continue operations, the entire burden of the court's orders fell upon the individual petitioners.

The temporary restraining order (21a) had directed that "defendants, and each of them," be restrained from refusing to receive, transport or deliver freight; this order was in effect and was obeyed by all petitioners from August 8, 1958 until the issuance of the preliminary injunction on August 20, 1958. Both the preliminary injunction (25a) and the permanent injunction (32a) commanded the named individual petitioners in their capacity as officers or directors of the railroad to resume and continue its operations. The only way in which that could be done was the way in which it was done—by the expenditure of their personal services and funds. That the injunctions did impose an obligation on the individual petitioners to expend their personal resources in the operations of the railroad was recognized by the parties and was repeatedly noted by the Courts below from the time the orders were issued (79a-80a, 92a-93a, 106a; *infra*, pp. 38, 55).

Reasons for Granting the Writ

The case involves a vital constitutional question as well as important questions under the Interstate Commerce Act, relating to the abandonment or suspension of railroad operations, which have not been and ought to be determined by this Court. The Court of Appeals also decided federal questions in a manner contrary to controlling decisions of this Court.

1. The decision below, commanding continued operations which could not be performed except at a loss and

which the railroad lacked means to perform, and commanding the individual petitioners to perform such operations, is in conflict with the decision of this Court in *Brooks-Scanlon Co.* v. *R. R. Comm'n*, 251 U. S. 396 (1920), holding that such an order would constitute a deprivation of property without due process of law. The decision is in this regard likewise in violation of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.

2. The decision below, affirming a judgment not merely enjoining abandonment in order to preserve the railroad properties but also affirmatively commanding operations which the railroad lacked means to perform, is in conflict with the established principle, enunciated by another panel of the same court and by other courts and the ICC, that involuntary cessation of service does not constitute an abandonment of the railroad or of its operation for which prior permission of the ICC is required. Such decisions are *Zirn* v. *Hanover Bank*, 215 F.2d 63, 69 (2d Cir. 1954); *John* v. *Waco, Beaumont, Trinity & Sabine Ry.*, 166 F.2d 419, 421 (5th Cir. 1954); *Farmers Grain Co.* v. *Toledo, P. & W. R. R.*, 158 F.2d 109, 117-119 (7th Cir. 1946), *vacated as moot*, 332 U. S. 748 (1947); *Myers* v. *Arkansas & Ozarks Ry.*, 185 F. Supp. 36 (W. D. Ark. 1960); and *Chamber of Commerce of Demopolis* v. *Southern Ry.*, 206 I. C. C. 70, 74 (1934).

3. The decision below, affirming a judgment imposing a personal obligation to operate the railroad on the individual petitioner officers and directors, is without any basis in law and is in conflict with the decision of another panel of the same court in *Meyers, et al.* v. *Famous Realty, Inc., and Moses Spatt and Joseph S. Wohl*, 271 F.2d 811 (2d

Cir. 1959), *cert. denied*, 362 U. S. 910 (1960), holding that only carriers by railroad can be enjoined from abandoning railroad operations, that petitioners Moses Spatt and Joseph S. Wohl were not carriers by railroad, and that they were not obligated by reason of their ownership of land on which the railroad had operated to continue the operations after abandonment by the railroad had been authorized by the ICC.

4. The decision below, holding that the injunction as to these individual petitioners was justified because they could have sought to escape liability by petitioning for reorganization of the railroad under the Bankruptcy Act, is in conflict with the holding of this Court in *Landis* v. *North American Co.*, 299 U. S. 248, 257 (1936), that an unlawful order cannot be justified by the existence of means of escape from it.

5. The decision below, enjoining abandonment of the operation of the railroad and commanding the continued operation of spur, team, and side tracks located wholly within a single state pending authorization from the ICC to abandon such operation, is in conflict with the express provision of Section 1(22) of the Interstate Commerce Act (printed *supra*) that the authority of the ICC shall not extend to the construction or abandonment of such tracks.

ARGUMENT

I

"A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." *Brooks-Scanlon Co.* v. *R. R. Comm'n*, 251

U. S. 396, 399 (1920). In the instant case, the District Court found that the railroad had lost money for five years, was still losing money, and had liquid assets of only $400 (*supra*, pp. 9-10; 27a, 28a, 23a, 24a). On the strength of such undisputed findings the Constitution, as interpreted in *Brooks-Scanlon Co.* v. *R. R. Comm'n, supra*, required denial of the injunction and dismissal of the complaint.

This was not a case of a railroad continuing to exercise a franchise while seeking to rid itself of an unprofitable phase of an operation which on the whole was profitable. This was a case where the conduct of the entire business had for many years resulted in large, continuing, and increasing losses which finally rendered continuation of service impossible (*supra*, pp. 9-10). In these circumstances no injunction could constitutionally reach beyond a direction to preserve properties and rights of way until such time as resumption of operations should become feasible or the ICC should authorize abandonment. In compelling continued operation in the face of continued operating losses, the judgment transgressed permissible constitutional limits. *Brooks-Scanlon Co.* v. *R. R. Comm'n, supra.*

II

Apart from its constitutional error, the judgment below was also contrary to the plain words of Section 1(22) of the Interstate Commerce Act. The railroad's only continuous carriage was by water from its tracks in Brooklyn to interchange points in the Bronx and Hoboken, New Jersey. All the freight was received or delivered solely over side tracks in or alongside the shippers' buildings and over team tracks where railroad cars were spotted for the transfer of freight from and to trucks. These side and team tracks were connected by spurs with the so called "main

line" which ran from one dead end to another for approximately 3,000 feet. The main track had no function as a line of carriage and was used only as a place from which to push cars to or from the spur, team, and side tracks (82a-87a; *Jay Street Connecting R. R. Abandonment*, 307 I. C. C. 137, 138-140 (1959)).

In these circumstances two conclusions were permissible. Either all the trackage (including the so called "main line") consisted of spur, team, and side tracks within the meaning of Section 1(22) of the Act and was without the jurisdiction of the ICC; or all the trackage except the so called "main line" was without the jurisdiction of the ICC. In either event, the judgment below enjoining the abandonment of any of the trackage was error, since under Section 1(22) of the Act abandonment of spur, team, and side tracks (which were not included in the certificate of public convenience and necessity pursuant to which the railroad operated, *infra*, p. 44) did not require authorization of the ICC and an injunction against the abandonment of such tracks was not authorized by law. The Court of Appeals' view that such tracks when constituting the sole terminal facilities are part of the main line which may not be abandoned would, even if correct, apply only to the team tracks and would not apply to the side tracks, located on shippers' premises.

III

The courts below also misinterpreted Section 1(20) of the Interstate Commerce Act (49 U. S. C. § 1(20)) as authorizing, in the circumstances of this case, a mandatory injunction requiring the railroad to receive and deliver freight. It was literally impossible for the railroad to continue operations (*supra*, pp. 9-10); and it is clear that an

involuntary cessation of service brought about by lack of means to continue does not constitute a prohibited abandonment of a line of railroad or of its operation.

In *Zirn* v. *Hanover Bank, supra,* the Court of Appeals for the Second Circuit in affirming an order granting leave to a bank to enforce against a bankrupt railroad its right to obtain possession of certain locomotives, said (215 F.2d at 69):

> ". . . The district court's orders did not permit the railroad or the bankruptcy-trustee to abandon either any part of its 'line' or any 'operation'. To 'abandon' in this context means, we think, to give up permanently, not merely to suspend operations for lack of physical equipment. No Commission approval is necessary where the cessation of operations results, not from the volition of the railroad or its bankruptcy-trustee, but from the exercise of the supervening rights, here recognized by the Bankruptcy Act, of third persons. . . ."

In *John* v. *Waco, Beaumont, Trinity & Sabine Ry., supra,* a petition of a creditor for reorganization of a railroad, joined in by the railroad, had been dismissed by the District Court because he was not satisfied that the petition was filed in good faith, in that reorganization was "hopeless" (74 F. Supp. 691). The railroad was in the custody of a state court receiver; it had discontinued most of its operations; and an application for a certificate of convenience and necessity permitting abandonment was pending before the ICC. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court and rejected a contention that refusal to permit reorganization amounted to a prejudgment of issues relating to abandonment. The Court said (166 F. 2d at 421):

> ". . . The question of abandonment of operation may be for the Interstate Commerce Commission;

> but it is not for the Commission to decide whether the bankruptcy court will take jurisdiction in rem in a reorganization proceeding when it is apparent that all efforts to obtain the benefit of Section 77 will be futile. The statute is plain; it says that the judge shall dismiss the petition if not satisfied that it was filed in good faith. . . ."

And (*Ibid.*):

> "This railroad was originally operated over lines approximately 42 miles in length, but all operations had been abandoned, when the petition was filed, except over about 9 miles, without the Commission making any order or applying to any court to require or secure continued operation. Neither the Commission nor the bankruptcy court can furnish the money necessary for continued operation, and the court's jurisdiction should not be invoked or permitted to furnish a false basis of credit to secure new funds for operating expenses."

Farmers Grain Co. v. *Toledo P. & W. R. R., supra,* was an action by a shipper to enjoin abandonment of operation of a railroad. The railroad filed a cross-complaint to enjoin unlawful conduct on the part of the railroad brotherhoods interfering with its operation. In reversing a decision of the District Court appointing a receiver to take possession of and operate the railroad's properties, the Court of Appeals for the Seventh Circuit said (158 F.2d at 117):

> "Appellees urge quite strongly that appellant has abandoned its railroad because, as it appears, the road cannot operate because of the unlawful interference of the Brotherhoods and because of the unlawful refusal of the connecting lines to interchange traffic with appellant. There is no merit in this contention. . . ."

The Court further said (*Id.* at 118-19):

> "Plaintiffs ask for equitable relief by way of mandatory injunction, to compel appellant to operate the road. It is elemental that the law will never require the performance of an act unless it is physically possible to perform it. Appellant's answer alleges acts of the Brotherhoods and their associates which, if true and continued, render the operation of the road impossible. . . .
>
> "As stated before we think plaintiffs are entitled to the mandatory injunction, providing appellant is protected by an injunction against interference by anyone in the operation of the road. . . ."

In *Myers* v. *Arkansas & Ozarks Ry., supra*, the District Court denied a temporary injunction which would have enjoined defendant from refusing to transport freight. The Court pointed out that the cessation of defendant's operation of trains was not voluntary within the meaning of the Act, and that it was impossible for the railroad to operate its trains. The Court stated (185 F. Supp. at 42):

> ". . . There is nothing in the record or the testimony to indicate that the defendants are financially able to continue to operate the railroad or to make the necessary repairs that have been made necessary by the severe rains."

In *Chamber of Commerce of Demopolis* v. *Southern Ry., supra*, the respondent railroad lacked funds to replace a bridge which had been destroyed when a steamboat collided with it. The ICC rejected complainants' contention that failure to restore the bridge constituted abandonment of a portion of a line of railroad, without a certificate that public convenience and necessity permit of such abandonment, in violation of Section 1(18) of the Act. The Commission said (206 I. C. C. at 74):

> ". . . The evidence of record does not sustain the allegation of the complaint to the effect that there has been an abandonment."

The law of New York is to like effect. *Public Service Comm'n* v. *International Ry.*, 224 N. Y. 631 (1918).

The above mentioned decisions reflect the application, in cases of involuntary cessation of service by a railroad, of the principle that it is improper for a court to order the performance of acts which are impossible. This Court forcefully stated the principle in *Maggio* v. *Zeitz*, 333 U. S. 56, 64 (1948), a bankruptcy case:

> ". . . Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed."

The sole reasons advanced by the Court of Appeals in the instant case for its refusal to follow the rule of the above mentioned decisions were as follows (*infra*, p. 31):

> "The railroad's books had shown it to be operating at a loss for five years prior to the unjustified abandonment attempt in August of 1958. Despite this, the appellants had made no attempt to obtain a rate increase, or to get permission from the Commission to abandon their apparently unprofitable line. As we pointed out in *Meyers* v. *Jay Street Connecting Railroad*, 259 F. 2d 532, at 536 (2d Cir. 1958), they could have sought to escape personal liability by petitioning for reorganization of the railroad under § 77 of the Bankruptcy Act, 11 U. S. C. § 205. This

> case is quite different from one where there is no way to escape personal liability or one where operation of the railroad suddenly—because of a catastrophe—becomes impossible without contribution from its owners."

We respectfully submit that in so holding, the Court of Appeals overlooked that the rule of the above decisions is not limited to impossibility which suddenly occurs, and that the Court was under a misapprehension when it assumed that rate increases might have been attainable. The railroad's revenues were derived from division of through rates (which had been increased) with trunk line carriers; and the ICC held, for reasons long well known, that an increase in the railroad's share of such divisions was not practicable (*Jay Street Connecting R. R. Abandonment*, 307 I. C. C. 137, 157-8 (1959)). The I. C. C. said (*Id.* at 158):

> "... We are unable to find that any probable increase in divisions would be sufficient to offset the applicant's present losses and to provide funds for the necessary rehabilitation of its operating facilities. ..."

Moreover, the Court of Appeals must have recognized, in view of the prior decision by another panel in a case involving several of the same parties (*Meyers, et al.* v. *Famous Realty, Inc., and Moses Spatt and Joseph S. Wohl, supra*, pp. 12-13), that the individual petitioners were not carriers by railroad and that no authority exists for compelling anyone other than a carrier by railroad to perform railroad services. The decision below sustained the unauthorized injunction solely upon the ground that the individual petitioners "could have sought to escape personal liability" by petitioning for reorganization of the railroad. It is at least doubtful that that course was available (95a-98a; *John* v.

Waco, Beaumont, Trinity & Sabine Ry., quoted *supra*, pp. 16-17); and even if it were available it could have benefited the petitioners only after further expense and delay. Most importantly, the decision below was in clear violation of the holding of this Court that the imposition by judicial order of an unlawful burden cannot be justified by the existence of means to obtain freedom from that burden. *Landis* v. *North American Co.*, 299 U. S. 248, 257 (1936).

IV

The principles of law involved on this petition are not academic and are of large public importance. Between the parties, a live controversy remains as to the right of petitioners to recover their damages resulting from the enforced continuation of railroad service (*infra*, pp. 25-29; *Groesbeck* v. *Duluth S. S. & A. Ry.*, 250 U. S. 607, 609 (1919)); and the public interest in the matters here adjudicated extends even beyond the proper administration of the statutes relating to the distressed railroad industry.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Court of Appeals Affirming Final Judgment

No. 96—October Term, 1960.

(Argued December 13, 1960 Decided April 3, 1961.)

Docket No. 25709

Before:

LUMBARD, *Chief Judge,*

SWAN and MOORE, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, Matthew T. Abruzzo, *J.*, enjoining the Jay Street Connecting Railroad and four of its officer-directors from discontinuing service on the railroad until the Interstate Commerce Commission issued a certificate of convenience and necessity authorizing abandonment.

Affirmed.

LUMBARD, *Chief Judge:*

The Jay Street Connecting Railroad, whose main track extends for seven city blocks along the East River in Brooklyn, and four of its officers and directors appeal from an order enjoining them from abandoning the road until a certificate of the Interstate Commerce Commission permitting abandonment of the Jay Street line became effective. Since the injunction issued on May 26, 1959, the railroad

has shut down pursuant to the Commission's certificate and thus we must consider whether the appeal should be dismissed as moot before passing upon the merit of appellants' attack upon the injunction. We hold that the appeal is not moot and, on the merits, that the injunction properly issued.

This controversy has been before us on several previous occasions. It was touched off by the railroad's announcement on August 6, 1958, that a shortage of funds would compel it to discontinue service in two days. Before it could carry out its plan, Judge Abruzzo, acting on the application of shippers and an owner of buildings serviced by the railroad, appellees herein, ruled that under § 1(18) of the Interstate Commerce Act, 49 U. S. C. § 1(18), the railroad could not be abandoned without a certificate of public convenience and necessity issued by the Interstate Commerce Commission. Pursuant to this ruling, he issued a temporary restraining order and later a preliminary injunction restraining the railroad and its officers from discontinuing operations. Issuance of the preliminary injunction was appealed to us and we affirmed in *Meyers* v. *Jay Street Connecting Railroad,* 259 F. 2d 532 (2d Cir. 1958).[1]

Following our decision, trial was held on various days between February 5 and February 20, 1959, and on April 14, 1959, the district court announced an opinion holding that the railroad and its officers should be enjoined from discontinuing service "until such time as the ICC passes upon [their application for abandonment of the line]." On May

[1]The district court then modified its injunction by excluding all spur and side tracks from its scope. We reversed the order modifying the injunction in *Meyers* v. *Jay Street Connecting Railway,* 262 F. 2d (2d Cir. 1959) and the preliminary injunction was thereupon reinstated.

26, 1959, the district court entered the order now before us, saying that the preliminary injunction, set forth in the margin,[2] was to remain in effect until the Commission's certificate permitting abandonment of the railroad "became effective."

Meanwhile the Commission, on April 13, 1959, issued an order in which they authorized abandonment of the railroad, 307 ICC 137. This order was amended on May 26, 1959, at which time the Commission stated that the order should take effect 30 days after service upon the appellees. The order was affirmed on June 26, 1959, by a statutory three-judge court in *Jay Street Connecting Railroad* v. *United States,* 174 F. Supp. 609 (E. D. N. Y. 1959)[3]

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[2]"The Court having written and filed its opinion, it is

ORDERED, that defendants, Jay Street Connecting Railroad, and Moses Spatt, Milton E. Spatt, Joseph S. Wohl, and Herbert S. Struller, in their capacity as officers or directors or employees of said defendant, Jay Street Connecting Railroad, and their agents, servants, employees and all persons in active concert and participation with them be and they hereby are restrained and enjoined until October 8, 1958 and thereafter as the Court or the trial judge may direct, from directly or indirectly abandoning or ceasing operations of the defendant, Jay Street Connecting Railroad, or refusing to receive, deliver or transport carload freight for shipment via its line to other lines and other carriers with which said defendant interchanges traffic, or from refusing to receive, deliver or transport carload freight from such other lines to points on its line, from embargoing freight or maintaining or continuing in effect any embargo of freight in interstate commerce and said defendants are hereby ordered and directed to cancel or cause to be cancelled any embargo heretofore put into effect and to continue operations of defendant, Jay Street Connecting Railroad, or if operations have been discontinued in any manner, to resume operations thereof; provided that plaintiffs give [383] security approved by the Court in the sum of $50,000 for the payment of such losses which the defendants may encounter or incur from this date until the case is tried should the defendants prevail in this action."

[3]On June 30, 1959, certain of the appellees brought an action against the owners of the land on which the railroad had been operated to compel them to continue its operation until themselves authorized by the Commission to abandon the line. The district court dismissed the complaint and we affirmed the district court. *Meyers* v. *Famous Realty, Inc.*, 271 F. 2d 811 (1959), cert. den. 362 U. S. 910 (1960).

Appendix "A"

No appeal was taken and service on the Jay Street line was in fact discontinued on or about June 27, 1959.

I

The appellees point to this sequence of events and argue that the appeal is moot since the order appealed from no longer restrains appellants.[4] We hold, however, that the appeal is not moot since the preliminary injunction was conditioned upon the giving of a $50,000 bond to cover appellants' losses in the event that a permanent injunction was found to be improper.[5] Our decision on this appeal, therefore, will determine whether appellants can recover on that bond and whether appellees are liable upon it.

The question presented is whether the requirement of Article III of the Constitution that there be a "case" or "controversy" is satisfied by the possibility that the issue now before us will, if we dismiss the appeal as moot, arise again in a suit upon the bond. Clearly, the Constitutional

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[4]For the purposes of this appeal it is not necessary to decide exactly when the Commission's certificate became effective and the injunction expired. All the possible dates—30 days after service of the Commission's May 26, 1959 order, or June 26, 1959 when the three-judge district court upheld the Commission's order, or August 25, 1959 when time to appeal from the ruling of the three-judge district court ran—are after the injunction but before the appeal from it was heard by us.

[5]The district court's order conditioned the injunction upon "security approved by the court in the sum of $50,000 for the payment of such losses which the defendants may encounter or incur from [the date of issuance] until the case is tried should the defendants prevail in this action. * * *" Appellees Brillo Manufacturing Co. and Abraham & Straus Division of Federated Department Stores, Inc. claim that they did not sign the $50,000 bond posted by the other appellees pursuant to the court's order.

requirement that the facts be full developed so that the court will avoid formulating a vague rule of law without the focus provided by a concrete set of facts to which it will apply has been met in this case. Compare *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). The more doubtful question is whether the bond ensures that the parties will be sufficiently adverse and sufficiently interested in the outcome to satisfy Article III. We believe that it does.

If there is substantial likelihood that the decision of the court will be determinative in some future litigation between the same parties or their privies, the court can be confident that the parties' self-interest will impel them to press every argument at their command and thereby help the court reach the right result and the interest in judicial economy is insignificant since the same issue will in all probability come before the court at a later date. The federal courts have recognized this and have held that the mere possibility that their decision will be advisory because the parties do not take further steps does not of itself make a case moot.

Thus where a regulatory order expires before a challenge to a decision upholding it can be heard on appeal, the appeal will nevertheless be heard if the order is likely to be reissued. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498 (1911); *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192 (D. C. Cir.), *cert. den.* 310 U. S. 647 (1940); cf. *Securities Exchange Commission* v. *Okin*, 132 F. 2d 784 (2d Cir. 1943); compare *Murphy* v. *Benson*, 270 F. 2d 419 (2d Cir. 1959). Similarly, if an allegedly illegal course of conduct is discontinued but is likely to be reinstituted if an appeal from an order prohibiting it is dismissed the case will not be considered moot.

Appendix "A"

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-10 (1897); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 448 (2d Cir., sitting as a court of last resort, 1945). Similar also are those cases where an attack is made upon a criminal conviction, the sentence for which has expired before an appeal can be heard. The Supreme Court has said that the justifiability of such appeals depends upon whether the appellant can show that the legality of his conviction might be a litigable issue in some future controversy. *Fiswick* v. *United States*, 329 U. S. 211 (1946) (Delay alien's eligibility for naturalization if he seeks naturalization); *United States* v. *Morgan*, 346 U. S. 502 (1954) (affect right to vote if seeks to vote; increase penalty under multiple offender statute if again convicted); *St. Pierre* v. *United States*, 319 U. S. 41 (1943) (no showing "that further penalties or disabilities can be imposed upon him as a result of" conviction).[6]

The decision on whether to hear a case of this nature depends primarily upon the likelihood that the issue before the court will arise in future litigation between the parties. See generally Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 133-46 (1946). It seems to us that the likelihood that the appellants in this case

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[6]*Parker* v. *Ellis*, 362 U. S. 574 (1960), decided by the Supreme Court last year, does not overrule these cases. Although the court's *per curiam* opinion mentions mootness, its decision is based upon construction of the habeas corpus statute, 28 U. S. C. 2241, which the court held limited the federal court's power to entertain collateral attacks upon state convictions to cases where the conviction being attacked provides the basis for present incarceration.

will sue upon the bond if victorious here is overwhelming.[7] Of course the mere fact that they have spent the money to come before us, represented by renowned counsel, does not necessarily establish that ultimate victory upon the bond is their reason for seeking an appeal and does not of itself make their appeal justiciable. Cf. *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308 (1893); *St. Picrre* v. *United States*, 319 U. S. 41 (1943). But this is indicative of their purpose and it is unrealistic to assume that they came before us merely seeking a moral victory.

To be sure, this case is different from the repetitive administrative order and discontinued conduct cases cited above in one respect. In those cases, the party asking the court to dismiss the appeal as moot could take advantage of the other party and prevent an appellate court from ever deciding upon the legality of their conduct by limiting the effective period of their orders or discontinuing their conduct at the crucial time. In this case, the appellees have no such power since the appellants could sue them upon the bond and that suit could not be made moot.

But the unsatisfactory nature of such a remedy is in itself reason to decide the issue between the parties now. In order to obtain judgment upon the bond the parties would have to relitigate the facts that were presented to the district court upon the injunction trial[8] and the issue would be

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[7]It is also true that in this case the danger that something will not be presented to us is less than in most cases which arguably have become moot on appeal. The relevant facts are the same as they were when the preliminary injunction's validity was argued before us and the parties clearly were interested in the litigation's outcome at that time.

[8]The judgment of the district court granting the injunction would have to be vacated so that it would not be *res judicata* between the parties. *United States* v. *Munsingwear*, 340 U. S. 36 (1950).

whether an injunction could properly have been issued. Undoubtedly, the district court would then hold against them as it already has and an appeal would be taken to this court raising precisely the same issue as is now before us.

This procedure would be frustrating to the parties and would violate rather than serve the policy favoring economy of judicial effort. We are confident that the bond guarantees the parties' vigorous participation in this appeal. To dismiss it as moot would be formalistic to an extreme and we therefore turn to the merits.

II.

The appellants attack the injunction on three grounds. First, they say that § 1(22) of the Interstate Commerce Act, 49 U. S. C. § 1(22), set forth in the margin,[9] exempted them from the Act and therefore that they could abandon the road at will. Second, they argue that even if subject to the Act, the railroad should not have been required to continue operations since it was without funds. Finally, they contend that the injunction compelled the individual appellants to use their personal funds to operate the railroad and that such an order is unwarranted.

The appellees argue that our decision affirming the preliminary injunction, *Meyers* v. *Jay Street Connecting Rail-*

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[9]Section 1(22) of the Interstate Commerce Act (49 U. S. C. § 1(22)) provides:

> "The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railway, which are not operated as a part or parts of a general steam railroad system of transportation."

road, 259 F. 2d 532 (2d Cir. 1958), resolved all these issues and therefore is binding upon as the law of the case. We do not consider ourselves bound by that earlier decision,[10] but reaffirm our views stated there and approve the permanent injunction as we did the preliminary injunction.

Though a portion of the railroad was, in the words of § 1(22) of the Act composed of "spur * * * switching or side track," located wholly within New York State, it had also a "main" track and provided interstate service by ferrying railroad cars to New Jersey. Therefore, the railroad could not be abandoned without the Commission's certificate. *Meyers* v. *Jay Street Connecting Railroad*, 259 F. 2d 532-36 (2d Cir. 1958); *Meyers* v. *Jay Street Connecting Railroad*, 262 F. 2d 676 (2d Cir. 1959).

We come now to the only question which needs further discussion, namely, the contention that the injunction compelled the individual appellants to use their personal funds to operate the railroad and that such an order is unwarranted.[11] Certainly there was no specific requirement that the individuals should use their personal funds to keep the railroad in operation. The order was directed to them "in their capacity as officers or directors or employees of said defendant, Jay Street Connecting Railroad." See note 2,

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[10]The issue on an appeal from a preliminary injunction is different from where a permanent injunction is tested. *Benson Hotel Corp.* v. *Woods*, 168 F. 2d 694, 697 (8th Cir. 1948); cf. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953), and in this circuit at least the " 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F. 2d 896, at 898 (2 Cir. 1924); *Alexander* v. *Nash Kelvinator Corp.*, 271 F. 2d 524, 526 (2d Cir. 1959).

[11]The record is not clear but it appears that Moses Spatt and Joseph S. Wohl, who were the sole owners of the railroad's stock, were the only individuals who contributed funds to enable the railroad to operate.

supra. But even if it be assumed that the order impliedly required them to use their own funds, we hold that under the special circumstances of this case such an order was proper.

The railroad's books had shown it to be operating at a loss for five years prior to the unjustified abandonment attempt in August of 1958. Despite this, the appellants had made no attempt to obtain a rate increase, or to get permission from the Commission to abandon their apparently unprofitable line. As we pointed out in *Meyers* v. *Jay Street Connecting Railroad*, 259 F. 2d 532, at 536 (2d Cir. 1958), they could have sought to escape personal liability by petitioning for reorganization of the railroad under § 77 of the Bankruptcy Act, 11 U. S. C. § 205.[12] This case is quite different from one where there is no way to escape personal liability or one where operation of the railroad suddenly—because of a catastrophe—becomes impossible without contribution from its owners.

Under the circumstances of this case the hardship imposed was fully justified in view of the public interest in not permitting abandonment of railroad service without approval of the ICC as required by the Interstate Commerce Act.

Affirmed.

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[12]It has been suggested by the appellees that the individual appellants chose to finance the railroad despite its losses because reorganization proceedings might have rendered impossible consummation of a sale of property owned by the individual appellants, including some of the property used by the railroad, to the Consolidated Edison Company for $1,300,000. The contract of sale was entered into on July 29, 1958, seven days before the railroad announced its intent to abandon, and the closing of title was conditioned upon removal of the railroad's float bridge at Bridge Street.

APPENDIX "B"

Opinion of the Court of Appeals Affirming Preliminary Injunction

No. 395, Docket 25309

(Argued September 29, 1958 Decided October 7, 1958. Rehearing Denied October 27, 1958.)

Before CLARK, Chief Judge, and LUMBARD and MOORE, Circuit Judges.

LUMBARD, Circuit Judge.

The question for decision is whether there is sufficient basis for the district court's issuance of a preliminary injunction enjoining the Railroad and the four individual defendants from ceasing operations on the ground that the Interstate Commerce Commission has not permitted abandonment. We think the preliminary injunction was properly issued and we affirm the order of the District Court for the Eastern District of New York.

On August 20, 1958, Judge Abruzzo, after a hearing which commenced August 13, issued an injunction, preliminary to a trial of the action set for October 6, 1958, which enjoined defendants from

> "directly or indirectly abandoning or ceasing operations of the defendant, Jay Street Connecting Railroad, or refusing to receive, deliver or transport carload freight. * * *"

The order is conditioned upon the giving of $50,000 security by the plaintiffs to safeguard against interim losses should the defendants ultimately prevail.

The plaintiffs here all either ship freight on the Railroad, or own buildings presently served by it. The individual

defendants are all officers, stockholders or directors of the corporate defendant, the Jay Stret Connecting Railroad.[1]

The Railroad's main track of 3,102 feet is entirely located within a small area of Brooklyn adjacent to the East River and extending for a few blocks under and on either side of the ramp of the Manhattan Bridge. The Railroad delivers to and receives freight cars from its customers in this area solely by means of numerous spur tracks and team tracks which total in length respectively 6,313 feet and 3,352 feet. There is no public terminal where freight can be received or discharged, and freight is handled only by the carload. The other terminal points of the Railroad lie in the Bronx and in Hudson County, New Jersey, where the Railroad interchanges with the major eastern trunk line railroads. The Railroad transports cars between these shore line interchange points and its Brooklyn tracks by means of a carfloat propelled by a tug. Since 1941 the Railroad has operated under a certificate of convenience and necessity issued by the Interstate Commerce Commission.

During the last several years the financial condition of the Railroad has seriously deteriorated. The district court found that the Railroad has lost money for five years and is now losing money, that its current liquid assets are "approximately $400," and that "the present operation of the Railroad is being done on borrowed money." There is uncontested evidence in the record of large and increasing monthly losses. There is further undisputed testimony that the Railroad has recently managed to continue operations only by withholding from the trunk line roads their share of the freight charges which it had collected, and by ad-

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[1]Defendant Moses Spatt is a director, a vice-president, and owns fifty percent of the stock. The remaining fifty percent of the stock is owned by defendant Wohl, who is also secretary-treasurer and a director. Defendant Milton Spatt is executive vice-president and defendant Struller is comptroller.

vances from its stockholders. In June 1958 the Railroad applied to the Commission for a certificate of convenience and necessity authorizing abandonment of its operations, and hearings were set for August. Finally, after the district court proceedings referred to above, hearings were commenced before a Commission examiner on September 2 and concluded on September 10. The parties now await the examiner's report.

On August 5 the Railroad was notified by some of the trunk line roads with which it connects that no more credit would be extended to it. At about the same time the Railroad's tugboat met with an accident and was ruled unfit for use by the Coast Guard, thus necessitating the rental of another tug. On August 6 the Railroad notified its patrons that because of a lack of funds to meet operating expenses and in order to prevent the accumulation of cars it was issuing "an embargo on all freight, with no exceptions, from, to or via the Jay Street Terminal, The Jay Street Connecting Railroad, Brooklyn, New York, including all private side tracks, team tracks and other facilities, which embargo will become effective midnight, August 8, 1958." At the same time the Railroad notified its employees that their services would not be needed after August 8. The plaintiffs construed the embargo as a threat by the Railroad to abandon operations and they immediately sought a temporary restraining order forbidding such abandonment. On August 8 the district court issued a temporary restraining order. After the commencement of the hearing on August 13, it extended the order and on August 20 it issued the preliminary injunction here in issue.

The statutory bases for the injunction are paragraphs (18) and (20) § 1 of the Interstate Commerce Act, 49 U. S. C. A. § 1(18), (20). Paragraphs (18) provides that

"no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Paragraph (20) provides that "any * * * abandonment contrary to the provisions of * * * paragraph (18) * * * of this section may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest * * *."

It is conceded by both sides that the Jay Street Connecting Railroad is a "carrier by railroad subject to this chapter" within the meaning of paragraph (18) except as the Railroad or any part of it is affected by paragraph (22) of 49 U. S. C. A. § 1. Paragraph (22) provides: "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the * * * abandonment of spur, industrial, team, switching, or side tracks, located * * * wholly within one State. * * *"

Defendants urge three reasons for reversing the preliminary injunction. First, they argue that their August 6 embargo notice did not constitute a threat of abandonment within the meaning of paragraph (18). Second, they assert that paragraph (22) exempts such a significant portion of the Railroad from ICC jurisdiction as to leave the plaintiffs with no cause of action even if the embargo would have been an abandonment. Finally, they argue that whatever the legality of the proposed embargo, the district court's injunction is improper because the Railroad does not possess the funds to operate. We find no merit in these arguments.

[1, 2] The basis for defendants' first argument is their assertion that the August 6 embargo was intended only as

a temporary cessation of service, to last until funds with which to resume operations were somehow found. They urge that a cessation of service must be permanent in order to constitute an abandonment within the meaning of paragraphs (18) and (20) of 49 U. S. C. § 1, and in support of this proposition they cite language in Zirn v. Hanover Bank, 2 Cir., 1954, 215 F. 2d 63, 69, and in Wheeling & L. E. R. Co. v. Pittsburgh & W. V. R. Co., 6 Cir., 1929, 33 F. 2d 390, 392. It is true that these cases define abandonment as a permanent cessation of service. It is also true that the August 6 notice of embargo did not expressly recite an intention never to resume operations. That embargo was, however, an expression of an intention indefinitely to cease all service. We think the purpose of paragraphs (18) and (20) permits of no distinction between discontinuing service permanently and suspending it indefinitely. So far as these plaintiffs are concerned there is no way of knowing when they can expect service to resume and they can make no business plans on the possibility that service may be resumed.

We come next to the effect of paragraph (22) of 49 U. S. C. A. § 1. There is no doubt that a substantial part of the defendant Railroad's track consists of "spur, industrial, team, switching, or side tracks," the abandonment of which, at least separately, would not fall within the authority of the ICC. The Railroad, however, also contains track the abandonment of which is clearly within the authority of the ICC. This is so on two accounts. First, defendants concede in their brief that the Railroad contains a "main line" in addition to its spurs and sidings. In addition, the Railroad is an interstate operation, with an interchange point in New Jersey, and paragraph (22) restricts the

authority of the ICC only insofar as intrastate side lines are concerned.

[3] Were the defendants' threat to abandon limited to a part of the track it would have been necessary for the district court to determine whether that part was exempt from ICC authority under paragraph (22). It was unnecessary, however, to go into such questions in this case. The notice of embargo of August 6 was a proposal to abandon the entire operation of the Jay Street Connecting Railroad. This total abandonment would have included the abandonment of track within the jurisdiction of the ICC. It was therefore proper under paragraph (20) to enjoin the proposed abandonment of the entire line.

Defendants seek to excuse their threat of total abandonment by arguing that were they only to abandon all the spurs and side tracks which they claim they may properly abandon under paragraph (22), no shipper would have access to their lines. The effect would then, they say, be the same as that of the total abandonment which the district court enjoined. Of course it is open to the defendants to develop in the district court the facts regarding any abandonment which may be permissible under paragraph (22) and it would then be the duty of the district court to make findings with respect to such proposed abandonment. All that defendants have as yet proposed is an abandonment of their entire operation, and we hold that an injunction prohibiting that is proper.

[4] Once we have concluded that the proposed abandonment of the entire Railroad would be improper under paragraph (18) of 49 U. S. C. A. § 1, it is clear that the plaintiffs here are parties in interest entitled to an injunction

under paragraph (20) of that section. Plaintiffs are the Railroad's customers. Its cessation of service disrupts their business operations. Their interest in the matter could hardly be more acute.

[5] Defendants' final point is that Judge Abruzzo's injunction is improper because the corporation has not the funds or credit to comply. Were it in fact impossible for the individual defendants to avoid contempt proceedings without sacrificing their personal funds this point would be a serious one. As it is, however, defendants can attempt to escape personal liability by petitioning for reorganization of the railroad under § 77 of the Bankruptcy Act, 11 U. S. C. A. § 205. They have not sought this relief. Unless they do so, and relief is denied to them, it is our opinion that the hardships imposed by the injunction do not outweigh the strong purpose of the Interstate Commerce Act to prohibit the abandonment of railway service without the approval of the ICC.

It is to be hoped that in view of the financial situation allegedly faced by the Railroad the examiner and the Commission will expedite their determination of the application to abandon.

The order is affirmed.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing is denied. The original opinion stated that "it is open to the defendants to develop in the district court the facts regarding any abandonment which may be permissible under paragraph (22) and it

would then be the duty of the district court to make findings with respect to such proposed abandonment." The district court was confronted only with a proposal for total abandonment. Until it has had an opportunity to pass upon such other and different proposals which plaintiffs may wish to advance, there is no occasion for appellate consideration of the matter.

APPENDIX "C"

Opinion of the District Court Modifying Preliminary Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 18924

December 1, 1958.

ABRUZZO, *D. J.*

The defendants have applied for an order modifying the preliminary injunction issued by this Court on August 20, 1958. The background of this proceeding is amply set forth in the opinion of this Court dated August 19, 1958, the opinion of the Court of Appeals, Second Circuit (259 F. 2d 532), affirming the order of this Court, and the memorandum opinion rendered by the Court of Appeals on the defendants' application for reargument.

In its opinion affirming this Court's order denying the defendants' application for a preliminary injunction, the Court of Appeals said (pp. 535-6):

> We come next to the effect of paragraph (22) of 49 U. S. C. § 1. There is no doubt that a substantial part of the defendant Railroad's track consists of "spur, industrial, team, switching or side tracks," the abandonment of which, at least separately, would not fall within the authority of the ICC. The Railroad, however, also contains track the abandonment of which is clearly within the authority of the ICC. This is so on two accounts. First, defendants concede in their brief that the Railroad contains a "main line" in addition to its spurs and sidings. In addition, the Railroad is an

> interstate operation, with an interchange point in New Jersey, and paragraph (22) restricts the authority of the ICC only insofar as intrastate side lines are concerned.
>
> Were the defendants' threat to abandon limited to a part of the track it would have been necessary for the district court to determine whether that part was exempt from ICC authority under paragraph (22). It was unnecessary, however, to go into such questions in this case. The notice of embargo of August 6 was a proposal to abandon the entire operation of the Jay Street Connecting Railroad. This total abandonment would have included the abandonment of track within the jurisdiction of the ICC. It was therefore proper under paragraph (20) to enjoin the proposed abandonment of the entire line.

Upon the reargument before the Court of Appeals, a memorandum decision was handed down as follows:

> The district court was confronted only with a proposal for total abandonment. Until it has had an opportunity to pass upon such other and different proposals which plaintiffs [*sic*, obviously the Court meant defendants] may wish to advance, there is no occasion for appellate consideration of the matter.

Because of the Court of Appeals' decision and memorandum decision on reargument, defendants now seek to specifically eliminate from the scope, force and effect of the injunction the spur, side, switching and team tracks. A hearing was held in open Court at which all parties were given the right to call witnesses and present evidence as to whether the preliminary injunction should be modified.

That the matter now before the Court is a mixed ques-

tion of fact and law is not open to question. *United States* v. *State of Idaho,* 289 U. S. 105.

FACTS

The defendants offered in evidence a map of all the tracks operated by them (Exhibit A-1). They have used various colored lines to indicate the following types of trackage:

Red—main line of Railroad
Yellow—extensions to float-bridge
Blue—spur tracks
Green—side tracks
Brown—team tracks
Purple—switching tracks (these tracks in fact are storage tracks)

They do not seek by the present proceeding to review the order of injunction issued by this Court relating to the main line indicated on this map, Exhibit A-1, by a red line. The defendant Railroad concedes that the two orange lines which connect the float-bridge with the main track must be considered part of the main track and does not seek to disturb the injunction as to those particular tracks, nor does it seek to vacate the injunction with respect to the purple tracks indicated on this exhibit to the right and to the left of the float-bridge.

Milton E. Spatt is executive vice president and general manager of the defendant Railroad and has acted as such for many years. He testified that all the tracks as seen on Exhibit A-1, except the red tracks, the orange tracks from the float-bridge to the main red track, and the purple tracks, were not owned by the defendant Railroad and that he did not know who owned them.

Appendix "C"

The plaintiffs had the opportunity to call witnesses and develop any facts that would be helpful to the Court, including the right to contradict the witness Spatt. The plaintiffs did not call any witnesses but rested upon Spatt's testimony and the exhibits offered in evidence. Some of these exhibits are referred to hereinafter.

This Court finds that the tracks marked in red, orange and purple are owned by the defendants; the others are not—evidence was not adduced as to who does.

EXHIBITS

Defendants' Exhibit B is an application to the Interstate Commerce Commission, dated December 7, 1940, to acquire and operate, under lease, a line of railroad in Kings County, New York, and to operate carfloat and lighterage routes between the Jay Street Terminal, in Brooklyn, and rail and steamship terminals at New York Harbor, in Kings, New York, and Bronx Counties, New York, and Hudson County, New Jersey. The following is quoted from that exhibit (p. 131):

> The tracks proposed to be leased include a main line between New Dock Street and Main Street, 815 feet, on land to be leased from Jay Street Terminal between Main Street and Jay Street, 1,317 feet (in city streets), and between Jay Street and Gold Street, 970 feet, on land to be leased from Arbuckle Brothers; spur tracks aggregating 6,313 feet, of which 3,375 are in city streets; public team tracks aggregating 3,352 feet; storage tracks, 5,170 feet; float-bridge tracks, 200 feet; and tracks on two levels of the freight house, 1,045 feet; total, 19,182 feet.

Appendix "C"

Page 134 of that particular exhibit is the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission. It restricted the trackage which defendant Railroad was permitted to operate and reads as follows:

> IT IS HEREBY CERTIFIED, That the present and future public convenience and necessity require (1) acquisition and operation, under lease, of the line of railroad of Jay Street Terminal in Kings County, N. Y., and (2) operation of the carfloat and lighterage routes in Kings, New York, and Bronx Counties, N. Y., and Hudson County, N. J. described in said report, by The Jay Street Connecting Railroad.

(It is significant to note that spur, side and team tracks are not included in that certificate of convenience.)

Plaintiffs' Exhibit 2 is the application of the defendant Railroad to the Interstate Commerce Commission for a certificate of public convenience and necessity permitting abandonment. In that particular exhibit the defendant Railroad narrowed the extent of the certificate requested to the following language:

> The line of railroad sought to be abandoned lies entirely within Kings County, Borough of Brooklyn, State of New York, and has a "main line" trackage of 3,105 feet. Its total length is less than one mile extending from a point east of the foot of Bridge Street, to the foot of New Dock Street, approximately seven city blocks in length, along the Brooklyn water front paralleling the East River. Its termini, if such they can be called, are the so-called Bridge Street Yard situated at the foot of Bridge Street, and the Empire Yard, located at the foot of New Dock Street.

(This application before the Interstate Commerce Commission did not include spur, side and team tracks.)

Appendix "C"

The matter of the application for abandonment was fully tried before the Interstate Commerce Commission, briefs have been submitted by both sides, and a decision by that Commission is now awaited.

Plaintiffs' Exhibit 10 in evidence is the agreement between the defendant Railroad and the City of New York which gave the defendant Railroad the right to operate on tracks over the City streets as indicated in Defendants' Exhibit A-1.

At the present hearing the plaintiffs for the first time contend that this Court, pursuant to Section 24 of the New York State Railroad Law, cannot modify its preliminary injunction. Section 24 reads as follows:

> § 24. *Change of route, grade or terminus; abandonment of line or portion thereof*
>
> Notwithstanding the foregoing provisions of this section or of any other provision of law, any railroad corporation may by a vote of two-thirds of all its directors, or by action of its receiver or trustee if in receivership, reorganization or bankruptcy, taken with the permission of the court having jurisdiction, abandon all or any portion of its line or lines, or the operation thereof, provided, however, that the public service commission has determined that such abandonment is in the public interest.

Their claim is that this section itself amply furnishes this Court authority to continue the full injunction.

The defendants cite Section 27 of the Public Service Law of the State of New York. This Section 27, it is claimed by them, bears upon the issue now before this Court. It reads as follows:

> § 27. *Switch and side-track connections; powers of commission*

Appendix "C"

1. A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private side-track owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a side-track and switch connection with its line of railroad, whenever such side-track and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.

2. If any railroad corporation shall fail to install or operate any such switch connection with a lateral line of railroad or any such side-track and switch connection as aforesaid, after written application therefor has been made to it, any corporation or person interested may present the facts to the commission by written petition, and the commission shall investigate the matter stated in such petition, and give such hearing thereon as it may deem necessary or proper. If the commission be of opinion that it is safe and practicable to have a connection, substantially as prayed for, established or maintained, and that the business to be done thereon justifies the construction and maintenance thereof, it shall make an order directing the construction and establishment thereof, specifying the reasonable compensation to be paid for the construction, establishment and maintenance thereof, and may in like manner upon the application of the railroad corporation order the discontinuance of such switch connection.

3. The commission shall have power, where in its judgment it is reasonably necessary, to make delivery to, or complete delivery by a railroad corporation to require such railroad corporation to operate upon the property of another a switch or side-track,

and construct and maintain a proper connection thereto, with its line of railroad. Whenever the shipper and the carrier shall be unable to agree as to the terms of agreements respecting such switches or side-tracks, whether on the property of the railroad corporation or of another, and such connections, made between a railroad corporation and the owner or occupant of any premises served or to be served by such switch, or side-track, or connection, the same shall be subject to the approval of the commission. As amended L. 1917, c. 801; L. 1945, c. 855, §§ 29, 30, eff. April 18, 1945.

CASES

The authority of the Interstate Commerce Commission over the abandonment of interstate railway lines is effectively defined in *Colorado* v. *United States*, 271 U. S. 153, 164:

> This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 293. *It expressly excluded from federal control that part of the railroad which consists of "spur, industrial, team, switching or side tracks located . . . wholly within one State."* See

> *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra.* But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment. (Underscoring supplied.)

In *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, it was said (p. 278):

> When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks . . . to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiary [*sic*] fitted to appreciate.

Missouri, K. & T. R. Co. v. *Texas & N. O. R. Co.*, 172 F. 2d 768 (C. A 5th), defines the different types of tracks (p. 769):

> A "spur track" is defined as a "short branch line of track; especially a side track connected with its main line by a single switch"; and a "side track" is "a short track connected by switches at one or more points with the main track". Though not defined by the dictionary, a team track is well known

> to be one on which cars are placed to be loaded or unloaded by wagons, and now more frequently by trucks; and an industrial track is a spur or side track built to a factory or warehouse or other industry to handle its freight in carload lots.

This case then holds (p 769):

> They are all in contrast to the main line and are a part of terminal facilities. Looking to the words alone, it would seem that Congress intended that the Commission should be called into action only if a main line was to be extended to another terminal point, or was to be abandoned, for the paragraphs apply equally to extensions and abandonments. * * *

It is evident that the present application is properly lodged under the provisions of Section 1 (22) of the Interstate Commerce Act. The cited cases indicate clearly that the Interstate Commerce Commission, based upon the facts which have been presented to this Court, is without power to make any direction with respect to the spur, side and team tracks. It follows, therefore, that this Court has no jurisdiction over the spur, side and team tracks. The preliminary injunctive order of August 20, 1958, issued by this Court is modified as to all the tracks indicated on Exhibit A-1, except the red tracks, the orange tracks and the purple tracks.

Section 24 of the New York State Railroad Law cited by the plaintiffs is not applicable. That section undoubtedly refers to main lines. It cannot supersede federal statutes.

Testimony was offered by the defendants that if the injunction is vacated as to the spur, side and team tracks they intend to cease operating these particular tracks. The

plaintiffs in view of that testimony now have the right to make application to the Public Service Commission of the State of New York pursuant to Section 27 for any relief which they may deem appropriate, particularly paragraph 1 of that section which reads in part as follows:

> 1. *A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private side-track owned, operated or controlled by such shipper.* * * *.

Their rights under this Act are within the jurisdiction of the Public Service Commission and clearly an administrative function.

The plaintiffs pointed to cases which hold that this Court has ancillary jurisdiction to dispose of this matter under state law. *United States* v. *The Thekla*, 266 U. S. 328, 339. Such jurisdiction cannot be entertained by this Court.

In view of the fact that the defendant Railroad serves many shippers and it undoubtedly would be detrimental to their business to vacate summarily that part of the injunction relating to spur, side and team tracks originally issued, this Court will stay the execution of its modification of the injunction for a period of fifteen days after entry of an order. This will afford the plaintiffs ample opportunity to make whatever applications, either in this Court or to the Public Service Commission, they deem desirable or necessary.

An order may be entered in accordance with this decision.

/s/ MATTHEW T. ABRUZZO
U. S. D. J.

APPENDIX "D"

Opinion of the Court of Appeals Reversing Order Modifying Preliminary Injunction

No. 207, Docket 25458

(Argued January 6, 1959 Decided January 20, 1959.)

Before CLARK, Chief Judge, and LUMBARD and MOORE, Circuit Judges.

LUMBARD, Circuit Judge.

The primary issue presented on this appeal is whether Judge Abruzzo's modification of an injunction against abandonment of service by the defendant railroad as a result of an application subsequent to our opinion filed on October 7, 1958, 2 Cir., 259 F. 2d 532, so as to exclude from the effect of the injunction a proposed abandonment of the railroad's "spur, side, and team tracks" was based upon a proper construction of the exemption of "spur, industrial, team, switching, or side tracks, located or to be located wholly within one State," afforded by § 1(22) of the Interstate Commerce Act, 49 U. S. C. A. § 1(22) from the requirement imposed by § 1(18) that a certificate of public convenience and necessity be obtained from the Interstate Commerce Commission prior to abandonment of "all or any portion of a line of railroad." We hold that the construction of § 1(22) adopted below is in conflict with the statute and with the views we expressed in affirming the original injunction and we therefore vacate the modification of the prior injunction, and remand for further proceedings on the merits.

Subsequent to the issuance of embargo on all freight by the railroad on August 6, 1958, these plaintiffs, who are

shippers serviced by the line, commenced an action seeking injunctive relief under § 1(20) of the Interstate Commerce Act from an allegedly wrongful abandonment of operations without I. C. C. approval in contravention of § 1(18). After a hearing a preliminary injunction against the abandonment was issued which expressly included the spur, side and team tracks within its scope. We affirmed that injunction against a claim that it improperly included tracks which were within the exemption from I. C. C. jurisdiction over proposed abandonments provided by § 1(22) because:

> "The notice of August 6 was a proposal to abandon the entire operation of the Jay Street Connecting Railroad. This total abandonment would have included the abandonment of track within the jurisdiction of the I. C. C. It was therefore proper under paragraph (20) to enjoin the proposed abandonment of the entire line."

We also noted that

> "Were the defendants' threat to abandon limited to a part of the track it would have been necessary for the district court to determine whether that part was exempt from I. C. C. authority under paragraph (22) * * * Of course it is open to the defendants to develop in the district court the facts regarding any abandonment which may be permissible under paragraph (22) and it would then be the duty of the district court to make findings with respect to such proposed abandonment * * *"

We then denied a petition for rehearing stating

> "Until * * * [the district court] has had an opportunity to pass upon * * * other and different proposals * * * there is no occasion for appellate consideration of the matter."

Appendix "D"

When proceedings were recommenced in the district court the defendants, instead of proceeding to trial on the merits, moved for a modification of the injunction, asserting that they intended now to abandon only the spur, side and team tracks which were subsequently stricken by Judge Abruzzo from the injunction. The record on the hearing on this motion reveals, however: (1) that as of the time of trial of the motion the only service to shippers using the railroad that had ever been rendered was provided over side tracks or team tracks, all of which were proposed to be abandoned; (2) that no proposal for alternative service to shippers was made by the defendants, and no evidence was introduced to show that any alternative service would be either feasible or adequate; (3) that therefore the defendants' intention remained, insofar as it was manifested by proof of the availability and adequacy of its facilities, to abandon all service on the railroad through the device of abandoning all tracks which provide access to the "main line" which is concededly within the jurisdiction of the I. C. C. Defendants' assertion for the first time on this appeal that they are prepared to provide adequate service over the switching tracks is entirely without documentation in the record. On this record we are forced to conclude that Judge Abruzzo incorrectly held that the new proposal was for something other than the total abandonment of service which we had already held was properly enjoined.

The dominant fact which emerges incontestably from this record is that the abandonment of all spur, side and team tracks will of necessity work an abandonment of all means of access to the main line of the railroad which have thus far been shown to be feasible and reasonable. The defendants have from the outset argued in favor of an entirely literal reading of § 1(22) so as to exempt from

the special provisions of § 1(18) all tracks which may in railroad parlance be termed spur, side, team or industrial tracks. Such tracks may, however, be impressed with functions beyond those normally ascribed to them, as here they are the sole terminal facilities held out to the public for access to the main line. So long as these tracks are impressed with such an additional function they are, for purposes of § 1(18)-(22), inseparable from the main line and they may not be abandoned without an I. C. C. certificate of public convenience and necessity.

On June 17, 1958, these defendants did petition the I. C. C. for permission to abandon operations of the Jay Street Connecting Railroad. On December 23, 1958 a proposed report of the I. C. C.'s hearing examiner favorable to the abandonment was circulated to the parties. In the light of the information contained in the proposed report, which was consistent with the facts developed on both hearings in the district court, it appears that the purpose of the defendants in proposing their embargo and in contesting this injunction was to minimize their actual pecuniary losses prior to the I. C. C.'s grant of permission to abandon which now seems more likely in view of the hearing examiner's report. What we have said should make it obvious that these defendants may not anticipate the I. C. C.'s result by an uncertified premature abandonment.

However, the defendants have also consistently maintained that their losses have been considerably increased because they have at their own cost provided the plaintiffs and others with service over individual private facilities. They have at times seemed to assert a right to shift to the plaintiffs the burden of proving entitlement to such service by remitting them to proceedings under § 1(9) of

the Interstate Commerce Act before the Commission. We hold here only that the cessation of such private service when coupled with the abandonment of all reasonable means of access to the main line—taking into account such factors as the location of the railroad, and its facilities for the receipt and delivery of cargo customarily carried—is a violation of § 1(18) which must be enjoined under § 1(20).

We have for the first time on this appeal had the advantage of the intervention *amicus curiae* of the I. C. C. to argue its view of the scope of the exemption provided by § 1(22). The Commission takes no exception to the views expressed in our prior opinion in this case, and argues that the "new" proposal of the defendants advanced on the motion below was for an impermissible total abandonment. Unfortunately the I. C. C. did not seek to intervene in time to make its views available to the trial court.

It is to be hoped that the proceedings before the Commission will continue to go forward with their present dispatch, and that it will not be necessary unduly to prolong an exercise of equitable powers under § 1(20) which must necessarily subject the defendants to continuing large pecuniary losses. It would seem clear that any undue delay of the proceedings before the I. C. C. would justify application to the district court for appropriate relief.

The decision of the district court is reversed, the order modifying the preliminary injunction is vacated, and the prior order of August 20, 1958 is reinstated with a direction to proceed without further delay to the trial of this proceeding and the entry of a final order.